

MOTION FILED
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No. 87-1968

In The
Supreme Court of the United States
October Term, 1987

— o —
DINO BELLO, et al.,
Petitioners,
v.

NORMAN L. WALKER, et al.,
Respondents.

— o —
DINO BELLO, et al.,
Petitioners,
v.

MUNICIPALITY OF BETHEL PARK,
Respondent.

— o —
On Petition for Writ of Certiorari to the United States
Court of Appeals for the Third Circuit

— o —
**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT OF
PETITIONERS, DINO BELLO, ET AL.**

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE OF PACIFIC LEGAL FOUNDATION IN
SUPPORT OF PETITIONERS, DINO
BELLO, ET AL.**

This motion of Pacific Legal Foundation for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for petitioners; this consent has been lodged with the Clerk of

this Court. Consent has been withheld by counsel for respondents.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such legal action only where the Foundation's position has broad support within the general community. PLF's Board has authorized the filing of an *amicus curiae* brief in this matter.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of private property rights will provide an additional viewpoint with respect to the constitutional issues presented. PLF has participated in numerous cases involving issues arising under the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution.

The opinion below holds that a municipality's deliberate and arbitrary denial of an application for building permits, while constituting an abuse of governmental power, does not present extraordinary circumstances sufficient to result in a temporary taking of property. *Amicus* believes this ruling is in direct conflict with the recent land use decisions of this Court. Furthermore, *amicus* believes the decision poses a serious threat to the public interest in promoting responsible governmental land use

regulation and undermines the integrity of private property rights protected by the constitutional prohibition against the taking of property without just compensation.

For the foregoing reasons, Pacific Legal Foundation requests that the motion for leave to file the annexed brief amicus curiae be granted.

DATED: June , 1988.

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION IN SUPPORT OF THE PETITION
FOR WRIT OF CERTIORARI**

INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding
motion for leave to file brief amicus curiae of Pacific Legal
Foundation.

STATEMENT OF THE CASE

In 1976, petitioners, Dino Bello and Simmons Park Properties, Inc., received approval from the Municipality of Bethel Park for a single lot subdivision to be developed for 254 townhouses.¹ By the spring of 1979, 47 units were complete and the municipality had approved the installation of additional roads and sewers for further build-out of the project. Petitioners applied for building permits to allow construction of units where the roads and sewers were in place. However, the permits were denied and the project came to a halt.

Petitioners instituted a mandamus action in state court seeking issuance of the permits, damages, and a peremptory judgment. On May 5, 1981, the Court of Common Pleas of Allegheny County ordered the municipality to issue the building permits. An appeal from that order was quashed for failure to preserve objections.

Petitioners also filed separate complaints in federal court against the individual defendants and the municipality alleging that a number of municipal officials improperly influenced the decision to deny petitioners' application for building permits. Petitioners sought damages under 42 U.S.C. § 1983 for denial of their constitutional

¹ For a more complete statement of the facts see petitioners' statement (petition at 4-6) and the opinion below (appendix to petition at 2a-6a).

right to substantive due process and compensation for taking of property in violation of the Fifth and Fourteenth Amendments.²

The Court of Appeals for the Third Circuit agreed with the petitioners' argument on the substantive due process claim. The court stated:

"The plaintiffs in this case presented evidence from which a fact finder could reasonably conclude that certain council members, acting in their capacity as officers of the municipality improperly interfered with the process by which the municipality issued building permits, and that they did so for partisan political or personal reasons unrelated to the merits of the application for the permits. These actions can have no relationship to any legitimate governmental objective, and if proven, are sufficient to establish a substantive due process violation actionable under section 1983." *Bello v. Walker*, 840 F.2d 1124, 1129-30 (3rd Cir. 1988), appendix to petition (App.) at 11a.

The Court of Appeals, although acknowledging that arbitrary denial of the building permits constitutes an abuse of government power, also held that these same allegations would not support a temporary takings claim for damages allegedly caused by the denial. *Id.* at 1131, App. at 14a. The Court of Appeals reasoned that the refusal to issue building permits did not deny the petitioners "all use" of their property since they "retained the right to put their land to a variety of alternative uses." *Id.* Based on this reasoning the court held that a temporary takings claim could not be maintained.

² "[N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V, § 1. The Fifth Amendment applies to the states through the Fourteenth Amendment. *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 122 (1978).

SUMMARY OF ARGUMENT

Petitioners' application for building permits was denied because of alleged improper influence by municipal officials in the permit application process. Apparently, certain municipal officials wanted the permits denied for partisan political and personal reasons. The Court of Appeals determined that these actions, if proven, would have no relationship to any legitimate governmental objective. However, despite the alleged unlawfulness of the permit denial, the Court of Appeals held that a takings claim cannot be maintained unless the property owner has been denied all use of the property.

Amicus contends that the Takings Clause requires compensation where a property owner is damaged by an arbitrary denial of building permits sought for an otherwise lawful use of private property. The decisions of this Court have clearly established that, to avoid a taking, a restriction on the use of property must represent a valid exercise of regulatory power in that it substantially advances a legitimate state interest. Failure of a use restriction to advance legitimate interests renders the regulatory action invalid and effects a taking of the restricted property interest.

REASONS FOR GRANTING THE PETITION

I

THE COURT OF APPEALS' DECISION IS IN DIRECT CONFLICT WITH THE RULINGS OF THIS COURT AND OTHER FEDERAL COURTS

A. Land Use Regulation Which Fails to Substantially Advance Legitimate State Interests Effects a Taking

Agins v. City of Tiburon, 447 U.S. 255 (1980), established the accepted framework for the modern regulatory takings analysis. Under the *Agins* formulation, a land use regulation effects a taking if it fails to substantially advance legitimate governmental interests *or* denies the owner economically viable use of the land. *Id.* at 260. A regulation can be found to effect a taking under either branch of the analysis.

The two-step analysis in *Agins* recognizes first that a regulation must be a valid exercise of governmental power. The inquiry analyzes whether the regulation is supported by legitimate public purposes. If the regulation fails to substantially advance legitimate governmental interests, the action is not a valid regulatory measure and the resulting abridgment of property rights is an outright taking of those rights. *See also Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 127 (1978) (a use restriction may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose).

The Ninth Circuit, in conflict with the opinion below from the Third Circuit, has recognized the alternative basis for a takings claim set forth in *Agins*.

"In *Agins*, the Supreme Court identified two means by which a 'taking' may occur. . . . Consistent with the first prong, a 'use restriction on real property may constitute a taking if not reasonably necessary to the effectuation of a substantial public purpose.' . . . To the extent these regulations are inconsistent with California law, a question arises whether they are 'reasonably necessary' to advance the state interest. . . . [A]ssuming . . . the conditions imposed are illegal under California law, those conditions are not 'reasonably necessary' to advance those interests. If the landowners can establish that situation, the City may have 'taken' the landowners' property." *Sederquist v. City of Tiburon*, 765 F.2d 756, 761 (9th Cir. 1984) (citations omitted).

Last term, in *Nollan v. California Coastal Commission*, 483 U.S. —, 97 L. Ed. 2d 677 (1987), this Court strongly reaffirmed the first part of the *Agins* formulation.

"We have long recognized that land use regulation does not effect a taking if it 'substantially advance[s] legitimate state interests' and does not 'den[y] an owner economically viable use of his land.'" *Nollan*, 97 L. Ed. 2d at 687 (citing *Agins* and supporting authority from *Penn Central*).

In *Nollan*, the state interests asserted by the Coastal Commission were assumed to justify denial of the Nollans' application for a development permit. *Nollan*, 97 L. Ed. 2d at 688. The issue was whether those state interests were substantially advanced by the Coastal Commission's action of imposing a condition in lieu of denying the permit. The majority held that the condition requiring dedication of lateral public access was not related to the Coastal Commission's stated objectives which would have justified denial of the permit. Therefore, the regulatory action failed to substantially advance legitimate state interests and the

purpose of the building restriction was exposed as not being for legitimate regulatory purposes but was to take the Nollans' property without payment of compensation.

“[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of ‘legitimate state interests’ in the takings and land use context, this is not one of them.” *Nollan*, 97 L. Ed. 2d at 689.

Thus, the *Agins* and *Nollan* decisions very clearly establish that land use regulations which fail to substantially advance legitimate government interests may effect a taking. In the present case, petitioners' right to develop their property in a lawful manner (*see Nollan*, 97 L. Ed. 2d at 687 n.2) has been violated by the denial of petitioners' application for building permits. Contrary to the holding of the Court of Appeals below, a takings claim is stated by alleging that the right to use and develop property has been denied for arbitrary reasons unrelated to furthering any legitimate regulatory interests. Moreover, this follows irrespective of the economic impact of the regulatory action or the fact that the owner has not been deprived of all use of the property.

Other federal circuit courts and state supreme courts have followed the *Agins* decision recognizing that restrictions on property use that fail to advance legitimate state interests constitute a taking. *See MacLeod v. County of Santa Clara*, 749 F.2d 541, 545 (9th Cir. 1984); *McClimans v. Board of Supervisors of Shenango Township*, 529 A.2d 562, 568 (Pa. Commw. 1987). In *Herrington v. County of*

Sonoma, 834 F.2d 1488 (9th Cir. 1987), the Ninth Circuit noted the distinctions between the tests for takings claims and substantive due process claims.

“[B]oth takings claims and substantive due process claims may involve an assessment of whether the contested action was a reasonable and proper exercise of the police power. However, the test for reasonableness under taking doctrine is arguably less deferential to the government’s decision-making authority than the test for reasonableness under substantive due process. Compare *Agins v. City of Tiburon*, (taking case: regulation must ‘substantially advance legitimate state interests’) . . . with . . . *Ross v. City of Berkeley* (substantive due process violation occurs when zoning measure has ‘no rational relation’ to its objective). . . . [T]he Supreme Court has suggested that the *Agins* taking test is less deferent than the current substantive due process test. *Nollan v. California Coastal Commission*.” *Herrington v. County of Sonoma*, 834 F.2d at 1498 n.7 (citations omitted; emphasis added by the Court).

In the opinion below, the Third Circuit upheld petitioners’ theory on the substantive due process claim. The Ninth Circuit’s opinion in *Herrington* illustrates that in the analysis of a taking claim even less deference should be afforded to those responsible for the taking than would be afforded in the analysis of a substantive due process claim. Yet, the Third Circuit rejects the takings claim and ignores this Court’s decisions in *Agins* and *Nollan*.

The court below states that petitioners cannot maintain a temporary takings claim because the denial of the

building permits left a variety of alternative uses available.³ *Bello*, 840 F.2d at 1131, App. at 14a. This reasoning fails to recognize that petitioners' takings claim is based on the first prong of *Agins*. As discussed above, a taking of petitioners' property interest occurs if the permit denial fails to advance legitimate state interests. The court below erred by limiting its takings analysis to the second prong of *Agins* which focuses on whether an otherwise valid regulation goes too far by denying all economically viable use of the property. The economic impact analysis, however, is not relevant to petitioners' takings claim which alleges that the denial of the permits was not a valid regulatory action.

The irrelevance of alternative uses of petitioners' property is made clear by the decisions of the Fifth and Eleventh Circuits. In *Wheeler v. City of Pleasant Grove*, 664 F.2d 99 (5th Cir. 1981), the Fifth Circuit held that an arbitrary prohibition on the construction of an apartment building effected a taking. *Id.* at 100. Even though the property could have been used to construct a different type of building, *i.e.*, alternative uses of the property were available, this was irrelevant to the takings claim based on the arbitrary deprivation of the right to use and develop private property in a lawful manner. In the same case, the Eleventh Circuit has recently recognized that the temporary taking, which occurred while the restriction on

³ The Court of Appeals' assumption that denial of the permit application left open a variety of alternative uses is not realistic. The petitioners' property had been prepared for construction of the proposed townhouses and the municipality had approved and supervised the installation of roads and sewers. Petition at 4. Under these circumstances, no economically viable use was available other than the proposed development. Petition at 11-12.

apartment construction was in effect, requires compensation under this Court's decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. —, 96 L. Ed. 2d 250 (1987). *Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270 (11th Cir. 1987).

The *Wheeler* decisions directly conflict with the Third Circuit opinion in the instant case. The *Wheeler* decisions recognize that a temporary taking requiring compensation for damages may occur as a result of arbitrary land use restrictions even though alternative uses may exist for the property. The opinion below dismisses, as a matter of law, petitioners' claim for damages based on the identical takings theory.

The *Nollan* decision also illustrates that alternative uses are irrelevant to petitioners' takings claim. Similar to the Third Circuit opinion below, the California Court of Appeal ruled that the Nollans' takings claim failed because the Nollans were not deprived of all reasonable use of their property. *Nollan*, 97 L. Ed. 2d at 685. However, this Court reversed and found a taking irrespective of the available remaining uses because the Coastal Commission's restriction on the use of the property failed to substantially advance a legitimate state interest. The remaining alternative uses had no relevance to the takings analysis since the taking was based on an invalid governmental restriction on the private use of property.

B. Arbitrary and Unlawful Denial of Building Permits Is Not a Permissible Normal Delay

In *First Church*, this Court established that compensation is the required constitutional remedy for temporary takings as well as permanent takings. *First Church*,

96 L. Ed. 2d at 266-68. Temporary takings, however, were distinguished from "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like." *Id.* at 268.

The opinion below appears to characterize the municipality's delay in issuing the building permits as a normal delay (*Bello*, 840 F.2d at 1131, App. at 14a) and holds that the case does not present extraordinary circumstances making the lengthy delay a compensable taking. *Id.* at 1126, App. at 3a. This reasoning undermines the language in *First Church* identifying normal delays as those associated with the time required for the local government to process land use applications. *First Church*, 96 L. Ed. 2d at 268. While time must be allowed for decision making, the delay in issuing the building permits in this case was not the result of normal government operations but instead resulted from an arbitrary and unlawful denial of the permit application. The extraordinary delay occurred during the time the permits were wrongfully denied until the state court order mandated issuance of the permits. This was the period of the temporary taking. To hold that denial of building permits for personal or partisan political reasons is a normal delay in the permit application process ignores the proper functions of government and promotes irresponsible decision making.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for writ of certiorari should be granted.

DATED: June, 1988.

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